Appeal No. UKEAT/0002/20/BA

EMPLOYMENT APPEAL TRIBUNAL

ROLLS BUILDING, 7 ROLLS BUILDINGS, FETTER LANE, LONDON EC4A 1NL

At the Tribunal
On 22 May 2020
Judgement handed down on 05 June 2020

Before

THE HONOURABLE MR JUSTICE LINDEN

MS GLORIA MILLS

MR ANTONY STANWORTH

THE REVEREND JONATHAN GOULD — APPELLANT

ST JOHN'S DOWNSHIRE HILL — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	Ms KARON MONAGHAN QC (One of Her Majesty's Counsel) Instructed by: Boodle Hatfield LLP 240 Blackfriars Road London SE1 8NW
For the Respondent	Mr THOMAS CORDREY (Counsel) Instructed by: DWF Law LLP 1 Scott Place 2 Hardman Street Manchester M3 3AA

SUMMARY

UNFAIR DISMISSAL

MARRIAGE AND CIVIL PARTNERSHIP

The vicar of an evangelical Christian church, who was dismissed in August 2016, alleged that his dismissal was because of the breakdown of his marriage and that his dismissal amounted to marriage discrimination and was unfair. The Employment Tribunal found, on the evidence, that the reason for dismissal was a loss of trust and confidence in him. Although the breakdown of his marriage had contributed to the loss of trust and confidence, it was part of the background or context rather than part of the reason for dismissal: The Respondent's concern, insofar as it related to marital breakdown, was with his behaviour in the context of that breakdown rather than a moral or religious belief that a minister whose marriage breaks down cannot continue to serve. The marriage discrimination claim therefore failed. His dismissal was also fair.

Held: although the Claimant's discrimination claim might have succeeded if the decision to dismiss him had been significantly influenced by a belief that a minister cannot continue to serve if their marriage breaks down, or if they would not have been dismissed in the same circumstances had they not been married, the Employment Tribunal had been entitled to find as a fact that this was not what had happened. As a matter law, therefore, this was not a case of marriage discrimination. The appeal against the finding that the dismissal was fair was premised on there being an error of law in relation to the discrimination claim and it therefore also failed.

THE HONOURABLE MR JUSTICE LINDEN

Introduction.

1. The Appellant, who we will refer to as "the Claimant" is the former vicar of St John's Downshire Hill in Hampstead, London. In August 2016 he was dismissed by the Respondent, purportedly on the grounds that there had been a loss of trust and confidence in him. On 24 November 2016 he issued proceedings in the Employment Tribunal in which he alleged that his dismissal was in fact an act of direct marriage discrimination, following his separation from his wife in May 2015. He also alleged that his dismissal was unfair in that it was for a discriminatory reason and was in any event procedurally unfair.

2. This case was last before the Employment Appeal Tribunal on 5 October 2017, when Simler P (as she then was) rejected the Respondent's argument that the allegation of marriage discrimination should be struck out without hearing the evidence because it was legally misconceived: *Gould v Trustees of St John's Downshire Hill (No 1)* UKEAT/0115/17. Permission to appeal that decision was refused by Underhill LJ on 25 June 2018.

3. The matter was therefore considered by a full Employment Tribunal, sitting at London Central ("the Tribunal"), which heard evidence and argument on 1-9 April 2019. In a Reserved Judgment, which was sent to the parties on 4 June 2019, the Tribunal dismissed the Claimant's claims. It also said that, if it had upheld those claims or either of them, compensation would have been reduced by 100% on grounds of contributory fault and on the basis that he would have been dismissed in any event even if part of the reason for his dismissal was unlawful marriage discrimination. It is from this decision that the Claimant now appeals.

4. The hearing of the appeal took place via Skype for Business, and electronic bundles of materials and authorities were submitted for this purpose by the parties. The Claimant was represented by Ms Karon Monaghan QC, who did not appear below, and the Respondent was represented by Mr Thomas Cordrey who appeared below and, indeed, has represented the Respondent throughout the litigation between the parties. We are grateful to them and their instructing solicitors for the helpful way in which the case was presented.

5. After the hearing we were provided, at the Judge's request, with written submissions on aspects of the occupational requirement defences under Schedule 9 to the Equality Act 2010 together with copies of the written submissions to the Tribunal made by Mr Sendall on behalf

of the Claimant and Mr Cordrey on behalf of the Respondent. Again, we are grateful for these and have considered them carefully.

Factual background.

6. The church of St John's Downshire Hill ("St John's") is what is known as a proprietary chapel. This means that, although St John's is part of the Church of England, the premises are not owned by the Church of England and St John's is not governed by ecclesiastical law in the same way as other churches of the Church of England. Ministers at St John's are required to be licensed by the Bishop of Edmonton, the diocese in which the church is located, but the appointment and removal of a minister of a proprietary chapel is a matter for its governing body. Almost all of the income of St John's comes from congregational giving and it does not receive money from the Church of England.

7. St John's was incorporated in 2003 and was registered as a charity in 2010. Under the memorandum and articles of association of the charity, the trustees are the governing body. St John's also had a "Leadership Team", which replaced the church council in 2006. This comprised seven members of the congregation including the Claimant. Originally, there were three trustees namely the Claimant, Mr Lawson and Mr Chitra but, at the time of the decision to dismiss the Claimant there were five: Mr Burns, Mr Choi, Ms Wenham, Mr Lawson and Mr Chitra ("the Trustees"), the additional three trustees having been appointed in January 2016 and the Claimant having ceased to be a trustee in February 2016. The decision to dismiss the Claimant was taken by the Trustees at a meeting on 1 August 2016. Their decision was unanimous and, as the Tribunal found, on the grounds of an irretrievable breakdown in relations between the Claimant and the Trustees, the Leadership Team, certain members of staff and other members of the congregation.

8. The Claimant was employed from 1 September 1995. Over the years he helped to build up the congregation to approximately 200 people. The religious ethos of St John's is conservative and evangelical. Indeed, the Church of England was perceived by the Claimant as overly liberal and he regularly raised the question whether links with the Church of England should be severed. Members of the congregation describe it as a "fellowship" and as akin to a family.

9. The Claimant married Beth in 1997 and they subsequently had four children together. There were difficulties throughout their marriage but, in 2011, the Claimant informed the Leadership Team that he and his wife were having significant marital difficulties. He said

that they were seeking help from a number of people. The Leadership Team offered its support and suggested that he might like to take some time off, but the Claimant did not wish to do so.

10. Although there was a period of modest improvement after this, there was then a sharp decline in relations between the Claimant and his wife in September 2013 and, by September 2014, it was apparent that relations between them were very difficult. The Tribunal found that these difficulties were played out in a very public way in that, for example, the Claimant was spending a lot of time after services sharing very personal details about the marital difficulties and his views of his wife's difficulties. This included suggesting that she may not be a Christian and that she had a personality disorder. The Tribunal also found that he was asking members of the congregation not to speak to his wife about these issues, apparently with the intention of isolating her from the fellowship. His wife was also sharing information about their marriage difficulties with members of the congregation.

11. The difficulties in the Claimant's marriage continued. In May 2015, he and his wife formally separated and it appears that there was a settlement reached between them with a view to divorce in due course. She moved out of the family home and stopped attending St John's.

12. There were continuing concerns related to the Claimant's marital difficulties, both before and after May 2015, but there were other concerns about his behaviour which contributed to the breakdown in trust and confidence and which went back a number of years. From 2010, members of the Leadership Team had concerns about a number of governance issues, including concerns about certain property transactions. The feeling of the Leadership Team was that it was being asked to rubber stamp the Claimant's decisions rather than being consulted and enabled to perform its role effectively. The Leadership Team also challenged the Claimant about a clear conflict of interest in relation to a flat which he had bought from the Respondent but he stood his ground with the consequence that Mr Burns, the treasurer, resigned in 2012. Staff, of which there were six by early 2015, were not provided with proper employment contracts despite the Leadership Team repeatedly asking the Claimant to do so. Indeed, this had not been done by the time Mr Burns became a Trustee in January 2016.

13. The Leadership Team were also angered by the way in which the Claimant had dealt with the employment of Mr Roger Ong, a Singaporean national, who had relocated from Canada in 2011 with his family to take up the position of assistant minister on the understanding that his post would be permanent. In the summer of 2014, the Claimant changed his mind about this

without consulting the Leadership Team and offered Mr Ong a three year fixed term contract with no expectation that it would be renewed. This came as a shock to Mr Ong and the Leadership Team which felt that the Claimant did not consider that he was accountable for this type of decision. There were then problems with Mr Ong's visa, which was suspended in January 2015 on the grounds of non-compliance with Home Office requirements, and was only reinstated in April 2015 following an appeal and the provision of a new contract of employment to him.

14. In its Reasons the Tribunal traced, in detail, the unravelling of trust and confidence in the Claimant over the period of nearly two years from September 2014 to his dismissal. As Mr Cordrey emphasised, the reasons for this were not exclusively related to the breakdown of the Claimant's marriage. Moreover, the loss of trust and confidence was experienced by staff, by members of the congregation, a number of whom voted with their feet by ceasing to attend services or reducing or ceasing their financial contributions, the Leadership Team, who resigned en bloc in October 2015, and the Trustees, who ultimately had to decide whether the Claimant's employment could continue. It is also striking that, despite the marriage related issues, right up to the end the Respondent was willing to take measures such as mediation, or the Claimant taking a sabbatical, which might retrieve the employment relationship, rather than simply taking the position that the breakdown in his marriage necessarily meant that his ministry should come to an end in any event. This, submitted Mr Cordrey, showed that the Trustees were not influenced by a moral objection to the fact that the Claimant's marriage had broken down but, rather, were concerned about the impact of his behaviour on the life of the fellowship.

15. On the other hand, the Tribunal found that there were members of the congregation who believed on the basis of certain passages from Timothy, Titus and Peter in the New Testament that, given the importance of marriage, and since they must lead by example, a breakdown in a minister's marriage necessarily means that the ministry is broken and that it should therefore cease. Indeed, it had been understood from his preaching that the Claimant held this view. Amongst the Trustees, Mr Chitra held this view although, importantly, the Tribunal found as a fact that Mr Burns and Mr Choi did not, and that there was no direct evidence that Mr Lawson and Ms Wenham did.

16. There were also numerous documents which referred to the Claimant's marital difficulties as being an issue, on which he relied to argue that, as he put it, he had been dismissed because

of a belief that *"broken marriage equals broken ministry"*. At each stage of the chronological narrative the Tribunal therefore assessed the competing arguments and the evidence about what these documents showed. In the majority of cases it concluded on the evidence that what was being referred to by the author or the speaker (in the case of minutes of meetings) was the manifestation of the marital difficulties in the form of the Claimant's behaviour and/or its impact on his wife and others, but in some cases the Tribunal accepted that a document did indeed show the attitude alleged by the Claimant.

17. We will not refer to all of these documents but, by way of examples which are specifically relevant to the Claimant's arguments in the appeal, at paragraph 92 the Tribunal (which referred to the Leadership Team as "the LT") found that:

> *"92.At an LT meeting of 22 September 2014, called by Mr Lawson (but at which the claimant was not present), the concerns surrounding the public effects of the claimant and his wife's marriage difficulties were discussed, and there was consideration of how best the LT could support them. This is reflected in the notes of that meeting. They reflect the concern expressed by the LT for the claimant and his wife and "the impact on the fellowship". Issues discussed were: concern for the claimant's health generally; concern regarding the genuineness of the claimant's preaching (notwithstanding the very public marriage difficulties, the claimant had chosen to preach a series of sermons on marriage, which appeared hypocritical in the light of his own very public difficulties); gossip among the church, including an incident where the husband of one member of the congregation had become aware of the marriage situation and had questioned one of the LT members about it; bitterness and recrimination within the relationship and a seeming unwillingness on both parts to admit fault; the long-term future of that on the church; and a potential loss of trust from some of those closest to the problem. Two of the proposals discussed at that meeting were: that the claimant should limit his conversations in relation to his marriage within the fellowship to a few respected individuals; and that he should take a planned sabbatical."*

18. The Claimant was therefore offered a sabbatical but declined, assuring Mr Lawson that relations with his wife had improved.

19. In October 2014, a letter to the Claimant and his wife was drafted by the Leadership Team although ultimately it was not sent. The Tribunal set it out in full but it included the following passages:

"As you know the leadership team met on 22nd September. The reason for the meeting was the concern felt by all of us about your apparently failing marriage and the inevitable repercussions on both you, your immediate family and the church family as a whole…..

Jonathan, you said that it is unlikely that the fellowship will be damaged by your marital problems. The reality is that the fellowship has been harmed and will continue to be harmed until such time as you and Beth embark on a path towards genuine reconciliation. As a family we all grieve when a member or members of that family are in distress. Both of you have spoken of your unhappiness to several people - inside and outside fellowship. Many more are aware of "things not being right". This is unavoidable given your highly visible position as the head of St JDH. If we believe that our earthly marriages are a picture of Christ's union with the church it is hard to see how the broken marriage of the leader of the fellowship cannot be detrimental to the life of that fellowship..."

20. The Tribunal said:

"95. We have quoted from this draft letter extensively because the last sentence quoted above is one of the written expressions which Mr Sendall seeks to suggest indicates that the concerns of the LT (and the trustees) were along the lines of "broken marriage equals broken ministry", in other words that if the marriage breaks down, the ministry should end. However, in the context of the letter as a whole and in the light of the minutes of the meeting which preceded this letter, the central concern of the LT is clearly about the impact of the marriage breakdown on the fellowship due to its public manifestation, which had become problematic by this point; the marriage difficulties per se had, as noted, been known to the LT from 2011 without any action having been taken."

21. At paragraph 97, the Tribunal quoted from two emails from a member of staff, Ms Stead, which were dated 23 March 2015, and which said:

"Was I the only one last night who was massively disturbed by the huge abyss between what Jonathan preached about marriage from the pulpit and what he actually says to couples, ourselves included?"

"Jonathan doesn't practice what he preaches at home whatsoever according to everything I hear and observe and I was rather amazed at his ability to calmly and coolly teach the fundamentals of a loving, respectful marriage with his wife three rows back and his children front row!"

22. The Tribunal found at paragraph 97:

> *"This email is indicative of four things: that the concern about the claimant not "practising what he preaches" was a real one; that, despite the claimant in his evidence before the tribunal saying that he couldn't recollect preaching on marriage around this time, he clearly was; that, despite his denials in his evidence before the tribunal, the claimant was speaking to members of the congregation, including Ms Stead, about his marriage; and, something which was to become another important concern for the LT, certain people considered that the claimant was not treating his wife properly."*

23. In the spring of 2015, Ms Stead apparently decided to leave and raised concerns with Mr Lawson about the Claimant's suitability as a minister and his management of her role.

24. In early May 2015, Mr Ong then also resigned to return to Toronto without having any job to go to and despite the fact that his immigration issues had been resolved. The Tribunal found that this was *"because of the Claimant"*.

25. The Leadership Team then decided that Mr Chitra should carry out an investigation. At a meeting with the Claimant on 18 May 2015, the concerns of the Leadership Team about the situation were presented to him. These included the effects of the breakdown of the Claimant's marriage on his behaviour, care of staff and the unity and well-being of the fellowship. It was again proposed that he take a sabbatical. The Tribunal found that:

> *"123. The claimant was angry when the LT presented its concerns to him. He disagreed with the LT's assessment of the situation and risks to the fellowship and refused to acknowledge the seriousness of the issues it was raising. He appeared adamant that his ministry and leadership would continue unaffected and made no constructive suggestions as to how to move forward. Nor did he make any attempt to allay the LT's concerns but rather explained that it had completely overstepped the mark. He declined to take any time off at that stage"*

26. Thereafter, an additional problem which developed was with the Claimant's response to attempts to retrieve the employment relationship which, on the Tribunal's findings, showed him in an increasingly bad light. For example, the Tribunal found at paragraph 125 that:

"rather than address the very serious concerns presented to him, he sought to deny or minimise them and to suggest that it was the LT which had got it wrong.".

27. It also found that he had encouraged any staff and certain members of the congregation who had concerns about him to speak to him about their concerns before speaking to anyone else. This was described by the Tribunal as part of his modus operandi *"to seek to divide and to control"*.

28. Ms Stead then set out her concerns in writing in July 2015, in the context of Mr Chitra's investigation. She had:

> *"*98*…concerns about a lack of pastoral care, feeling unable to raise concerns with him.., feeling undervalued and demoralised as an employee, a lack of support, an unmanageable workload, poor line management and contradictory and divisive leadership, amongst other things. She also raised concerns about the claimant's working relationship with Mr Ong, highlighting a number of "underhanded" and "divisive" conversations that the claimant had had with her about Mr Ong's continued employment at the church. In addition, she highlighted her concern that the claimant's difficult personality was having an adverse effect on the welfare of the church itself and that this had caused some to leave the church."*

29. Mr Ong also put his concerns in writing in July 2015. The Tribunal found that:

> *"100…the concerns he raised to the LT (both verbally and in writing) were that he was concerned about the claimant's behaviour, not only as an employer but also as minister of the church; he highlighted concerns that the claimant could be unnecessarily selective about who should join the fellowship and had turned people away from the fellowship for no good reason; that in relation to staff relationships specifically, the claimant displayed poor leadership, a lack of care in managing staff fairly and a lack of integrity and accountability; he also raised concerns about the effects of the claimant's marital difficulties on his professional role, in particular the fact that the claimant's recent sermons on marriage had come across as insincere in the light of the well-known problems he was having in his own marriage and the fact that he considered that the claimant had displayed "abusive behaviour" in relation to his wife, by, for example, forbidding Mr Ong and his wife to meet with the claimant's wife or offer her support in a time of need and dealing with his marital problems in an inappropriate and public manner. Mr Ong was concerned that the claimant's behaviour was damaging to the*

fellowship."

30. In relation to Mr Ong's concerns related to the Claimant's marital difficulties, the Tribunal found that:

> *"101….Mr Ong's concerns were about the public manifestation of the marriage difficulties (and the way he perceived that the claimant treated his wife) rather than the fact that there were marriage difficulties per se."*

31. In the course of Mr Chitra's investigation a Mr Roger Staton, who was a volunteer staff member, also:

> *"133… set out his view that there was a lack of camaraderie among staff under the claimant's supervision and low morale; that there was a real lack of leadership and that the claimant did not communicate clearly or effectively with staff; that he sometimes felt uncomfortable carrying out work that the claimant requested him to do, because it was not always clear whether this work was driven by the needs of the church, or the claimant's personal situation, and that he had on occasion had to check with members of the LT before carrying out tasks to ensure that they were legitimate; he also raised concerns that the church's record-keeping was inadequate (as highlighted by the HMRC audit and the visa issues regarding Mr Ong) and that there was therefore a lack of accountability within the church."*

32. The Tribunal noted that:

> *"134. By this stage, therefore, three of the six staff members had, of their own accord, raised serious concerns about the claimant's professional role."*

33. There was a further meeting between Mr Lawson and Mr Chitra and the Claimant on 11 July 2015, at which the concerns were summarised in a two page document which was given to him. The Tribunal found that:

> *"144. In the summary of concerns, the various concerns were set out under headings about question marks over the claimant's leadership and him being seen not to practice what he preached and that he "lorded it over others", whilst Christian leadership should be one of humble service lived through a life of example. The subheadings under these headings included: the claimant's preaching; the motives behind the claimant's*

preaching often not being honourable and driven by his personal situation; his showing little care for the well-being of his staff; how harshly he spoke to his wife, "depriving her of the emotional needs and support from a loving husband"; the claimant's controlling matters and not trusting others to do things; the way in which he controlled things being manipulative and divisive, creating sides and alliances, creating camps and his "paranoid behaviour/questioning"; and a lack of accountability and integrity in his working behaviour (referencing inadequate record-keeping, HR records not being maintained, no documentary evidence of decisions taken)."

34. The references in this summary to the Claimant's motives behind his preaching were explained by the Tribunal as follows at paragraph 142:

"…it was a concern for members of the LT, trustees and the congregation that, beyond the claimant's sermons on marriage, the claimant was using the pulpit to vent his issues with others in the congregation. An example to which both Mr Choi and Mr Chitra referred in their evidence before this tribunal was that the claimant chose to preach about Job, who suffered and was beset by those around him whom he trusted; both of them felt that the claimant was portraying himself as Job and the LT as those around him who were behaving badly towards him."

35. In August 2015, Bishop Broadbent (who was then acting Bishop of Edmonton) was approached by Mr Lawson and Mr Chitra to ask for his advice on how best to address what they referred to as a *"crisis of trust"* in relation to the Claimant, and how best to mediate and resolve the issues. Members of the Leadership Team also met with the Claimant individually to discuss mediation and reconciliation in August and September 2015 but felt that no progress was made. The Claimant recognised that there were difficulties but did not think that they called into question his fitness to continue as minister of St John's. His position was that he refused to entertain the idea of a sabbatical and that if members of the Leadership Team felt that they could not support him they should step aside and allow new members to join who would support him.

36. In a letter from the Leadership Team and Mr Chitra dated 2 October 2015, the Claimant was therefore asked to resign on terms to be discussed. The request was repeated in a further letter dated 5 October 2015 on the basis that, if he did not resign, the Leadership Team would feel

compelled to resign. The Claimant, refused to do so and, instead, accepted their resignations by letter dated 6 October 2015. The resignation of the whole of the Leadership Team was therefore announced by the Claimant at the church's annual meeting on 7 October 2015.

37. The Claimant had apparently been canvassing for new members of the Leadership Team for some time. Many or all of the people now approached by the Claimant to join the Leadership Team declined to do so unless and until they knew more about why the previous Team had resigned and how the issues would be resolved.

38. On 2 November 2015, Bishop Broadbent wrote to the Claimant, Mr Chitra and Mr Lawson. His view was that there had been a clear breakdown in relationships between the Claimant, the trustees and the Leadership Team which might well be permanent but which they should nevertheless try to address through the services of a professional mediator. Importantly, in relation to the marital issues he said:

> *"There are some in the congregation who do not believe that it is acceptable that a Minister should be separated from his wife. I have made it quite clear that, unless there is evidence of adultery or other improper behaviour, the Church of England does not see separation as a barrier to continuing ministry. However, it is clear that some in the St John Downshire Hill Fellowship do not accept that this is the case."*

39. Having completed his investigation, Bishop Broadbent then produced a final report dated 2 December 2015. This reiterated the point about excluding the marital breakdown from consideration in the following terms:

> *"This has been raised as a concern by a number of correspondents. I would urge that the issue of Jonathan and Beth's marriage be entirely discounted from the conversations that are going on. … Those within the church who believe that marital breakdown (where there are no other parties involved) is incompatible with Christian ministry will need to be told that separation per se is no bar to continuing as a priest/presbyter in the Church of England."*

40. In relation to the breakdown in working relationships he said:

> *"This situation is probably exacerbated by what I have observed in Jonathan's way of dealing with criticisms directed at his leadership. His habit is to seek immediately to refute what has been said. If that doesn't work, he will solicit contrary responses and*

character references from others whom he sees as supporters. If that has no effect, he then seeks to minimise the criticism and move on. I do see this as a major problem for his leadership. People don't, I'm afraid, feel that Jonathan listens to them or takes any notice of their concerns. This is at the heart of the pastoral breakdown in the church."

41. The Bishop gave evidence in support of this view to the Tribunal, which accepted his evidence. Notwithstanding this view, his report recommended three options: a sabbatical, resignation or mediation. He also recommended that the Claimant step down as a trustee and that the number of trustees be increased to five. As a result, Mr Burns, Ms Wenham and Mr Choi were appointed on 11 January 2016. The Claimant was extremely unwilling to step down, despite the Bishop's view that he had a conflict of interest given that the trustees were effectively his employer, but he eventually did so on 9 February 2016.

42. The new Trustee body decided to attempt mediation. A reputable Christian organisation called "Bridge Builders" was therefore instructed and 128 hours of mediation work were undertaken over the following months at significant financial cost. The position of the Trustees was that the Claimant should take a sabbatical, during which the mediation would take place, and a six month sabbatical was agreed at the beginning of March 2016, albeit the Claimant did not engage with the terms of the written sabbatical agreement and did not sign it. The Tribunal also criticised the Claimant for announcing his sabbatical to the congregation without the knowledge or agreement of the Trustees and, characteristically, seeking to put his spin on the situation. For example, although the Claimant was aware that a decision would be taken as to whether he would return in September, he stated in his letter that he greatly looked forward to being back in September, as if his return was a given.

43. Although it had been agreed that the Claimant would take a complete break from St John's during his sabbatical, he undermined that agreement and conducted himself in a way which the Trustees considered to be *"divisive and unhelpful"*. Amongst other things, he contacted members of the congregation in an attempt to bolster support for his position, he engineered encounters with members of the congregation by walking a dog outside the church at the starting or finishing times of services, he asked members of staff to visit him at home or meet him so that he could gauge support for him, he visited the church office and he parked his car on church grounds despite requests from the Trustees not to do so.

44. The mediation process began in May 2016, but it was unsuccessful. A significant concern was that the Claimant did not accept any responsibility for the breakdown in relationships

and showed no insight into his behaviour or attitude. Nor, therefore, did he appear to have any intention to change his behaviour or attitude.

45. From July 2016, the Trustees therefore attempted to set up a meeting with the Claimant to decide the way forward but this never happened, essentially because he sought to avoid meeting with them. The Claimant did, however, meet with Bishop Wickham, by then the Bishop of Edmonton, on 15 and 22 July 2016. The Tribunal found that:

> *"203. Bishop Wickham concluded that the claimant was attempting to completely avoid the situation and had not adjusted his position at all as regards the situation at the respondent. He also concluded that he considered that there had been long-term manipulation and abuse of power by the claimant and that he had now seen regular glimpses of the manipulative behaviour that others had commented on as having taken place over the years. Bishop Wickham communicated to the trustees these aspects of the contents of these two meetings with the claimant."*

46. On 29 July 2016, the Claimant was invited to attend a meeting on either 31 July or 1 August 2016 to discuss his future employment and he was told that the meeting would proceed in his absence if he did not attend. He replied on 30 July 2016 stating that he would not be able to attend on either date as he was on holiday in Devon with his children.

47. The meeting of the Trustees therefore went ahead in his absence on 1 August 2016 and they unanimously decided that he should be dismissed with immediate effect but that his sabbatical to the end of the month would be honoured. He would then be paid three months' notice pay and permitted to live in the parsonage until the end of the year. The Tribunal found that the meeting took three hours and *"involved a huge amount of soul searching on the part of the trustees"*. The decision to dismiss was not taken lightly. All of the Trustees had known the Claimant for a very long time, and it was *"a personally very difficult decision for them to take"*.

48. The main issues discussed at the 1 August 2016 meeting were the lack of any meaningful progress in the reconciliation process, the unworkable nature of the relationship between the Trustees and the Claimant, the critical state of the church's finances given a significant fall in contributions from the congregation (which the Trustees linked, at least in part, to the breakdown in relationships within the fellowship) and the pastoral needs and the integrity of the fellowship. In relation to pastoral needs and the integrity of the fellowship the Tribunal found, as the minutes of the meeting reflected, that the Trustees:

"211…considered a range of different scenarios, including whether it would be feasible for the claimant to return in September 2016 or for the sabbatical to be extended. However, the consensus was that, despite attempts to reconcile, there remained a seemingly irreparable breakdown in the relationship between the claimant, the trustees and others in the congregation. The subsequent reconciliation process, which had involved considerable time and effort, had shown no prospect of the relationship breakdown between the claimant and the trustees being mended, nor had there seemingly been any change in the claimant's perspective or approach. In addition to the lack of progress in the reconciliation process, the trustees were concerned by their various interactions with the claimant since Bishop Broadbent's report, including his unwillingness to meet with the trustees, his unwillingness to cooperate with the trustees, or accept their legal authority or the terms of the sabbatical agreement. It seemed clear that the claimant did not and would not accept any responsibility for this relationship breakdown and had not changed his behaviour and could not work collaboratively with the trustees. The trustees felt that the relationship with the claimant had irretrievably broken down. They therefore concluded that the only viable option available was to terminate the claimant's employment.."

49. Importantly, the Tribunal also found that there was no discussion of the breakdown of the Claimant's marriage whether as being relevant to the decision about the Claimant's future, or at all. Indeed, the Respondent's witnesses were not able to say what the views of their fellow Trustees were on whether a broken marriage should lead to termination of ministry.

50. There was then an appeal by the Claimant which was heard by a retired Archdeacon on 11 November 2016. The Claimant attended, and was represented by a barrister, but the appeal was dismissed.

The Tribunal's findings as to the reason for dismissal.

51. The Tribunal began by making findings as to the reason for dismissal for the purposes of the unfair dismissal claim where, of course, the burden of proof was on the Respondent.

52. In relation to the question *"whether or not there was a breakdown in the relationship between the claimant and the trustees, LT, certain members of staff and other members of the congregation"*, at paragraph 224 the Tribunal found that *"there is an overwhelmingly large amount of evidence of such a breakdown"*. It then listed, in no fewer than 25 sub-paragraphs,

features of the evidence which showed that this was the case, and which reflected the findings of fact which it had made and which we have (relatively) briefly summarised above. These sub-paragraphs included paragraph 224 (13), to which we return below when we consider Ms Monaghan's arguments, but otherwise it is not necessary to repeat them here.

53. The Tribunal then turned to the question *"whether that breakdown in relationship was the reason for the claimant's dismissal."*. It said the following (emphasis added):

> *"227. The only other reason put forward as a potential reason for dismissal (by the claimant) is the breakdown of his marriage. As we have already indicated, the fact that the claimant was married and the fact that his marriage was in difficulties was certainly not the reason for his dismissal; as noted, the claimant's marriage was in difficulty as far back as 2011 but no action was taken. The claimant's argument, as made at this tribunal, is that it was the fact that he was married coupled with the apparent imminence of separation/divorce which was the reason for his dismissal. As set out in our summary of the law, we have accepted that, applying the EAT's earlier decision in this case, the EqA would be engaged if on the facts that were the case.*
>
> *228. First of all, the claimant's marriage was part of the background to events which led to the breakdown of the relationship. Several of the aspects of that breakdown as set out above are to do with the public manifestation of the marriage difficulties and the way the claimant conducted himself in the circumstances of his failing marriage. However, that is not the same as the reason for dismissal being the failing marriage; none of those events involved the marriage per se; rather they were manifestation of the problems of the marriage.*
>
> *229. As to the assertion that the reason or part of the reason for the dismissal was a belief that "broken marriage equals broken ministry", we have not found that four of the five trustees who took the decision even subscribed to this view. The exception to this is Mr Chitra: he continues to hold this view to this day and the numerous examples of this view being put forward which are set out in our findings of fact above are examples of Mr Chitra putting for this view. However, Bishop Broadbent's report clearly instructed him (and everyone else) not to take the claimant's marriage into account in determining the claimant's future at the respondent and we have accepted Mr Chitra's evidence that he followed this advice and did not take it into account in his decision to*

dismiss the claimant.

230. Furthermore, the evidence of all the respondent's witnesses, which is backed up by the minutes of the meeting of 1 August 2015 and the contents of the dismissal letter, is that they did not take into account the claimant's marriage but rather dismissed the claimant because of the breakdown in relationship referred to above.

231. We therefore accept that the reason that the trustees dismissed the claimant was because of the breakdown in the relationship with the trustees, LT, certain members of staff and other members of the congregation, and that it was not, even in part, because of the claimant's marriage, his marriage difficulties, his potentially imminent separation/divorce or any combination of these three things." (emphasis added)

54. The Tribunal therefore found that the reason for dismissal was *"some other substantial reason"* within the meaning of section 98(1) Employment Rights Act 1996. It then went on to find that the dismissal was fair having regard to the procedure followed and other considerations which were relevant to the issue of fairness under section 98(4) of the 1996 Act.

55. In relation to the marriage discrimination claim specifically, the Tribunal found as follows:

"252. We refer to the conclusions we have reached in relation to the reason for dismissal in the unfair dismissal section above, which apply equally in relation to the reason why the claimant was dismissed for the purposes of the direct marriage discrimination complaint; we do not repeat all of those conclusions here. We reiterate, however, that we have found that, although the claimant's marriage was the background to some of the reasons why trust and confidence in the relationship was irretrievably broken, the reason for dismissal (the "causa causans", as Lord Scott referred to it in Khan) was not in any way because of the claimant's marriage or his marriage difficulties or the imminent possibility of separation/divorce or any combination of these. Rather, it was entirely because of the irretrievable breakdown in the relationship between the claimant and the trustees, LT, certain members of staff and other members of the congregation." (emphasis added)

56. The discrimination claim was therefore dismissed.

Legal framework.

Introduction

57. In the light of the arguments in the appeal it is necessary to recall some of the key principles applicable to claims of direct discrimination under the Equality Act 2010 before considering the case law on marriage discrimination and how it applies in the present case.

Direct discrimination in general

Relevant statutory provisions.

58. Section 13 Equality Act 2010 provides:

> ***"13 Direct discrimination***
>
> *(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others."*

59. Section 23 of the 2010 Act provides in relation to comparators that:

> *"(1) On a comparison of cases for the purposes of section 13, 14, or 19 there must be no material difference between the circumstances relating to each case."*

Relevant case law

60. The general principles applicable to deciding whether there has been direct discrimination are very well established and have been for many years. We will summarise those aspects of the law which are relevant to the arguments in the present case rather than attempt a comprehensive analysis of the caselaw in this area.

61. The *"because of"* formulation in section 13 of the Equality Act 2010 did not give rise to any change to the law as explained in the cases which interpreted phrases such as *"on the grounds of"* and *"by reason that"* in the definitions of direct discrimination and victimisation in the legacy enactments which the 2010 Act brought together: see paragraph 61 of the Explanatory Notes to the Act and *Onu v Akwiwu* [2014] ICR 571 CA paragraph 19 (affirmed on different grounds by the Supreme Court at [2016] 1 WLR 2653).

62. The question whether an alleged discriminator acted *"because of"* a protected characteristic is a question as to their reasons for acting as they did. It has therefore been coined the 'reason why' question and the test is subjective. This point was made by Lord Nicholls in *Nagarajan v London Regional Transport* [2000] 501, 511C-D and again in *Chief Constable of West Yorkshire Police v Khan* [2001] ICR 1065 at paragraph 29 where he distinguished the nature of the 'reason why' question from the determination of "causation":

> *"*29*.....Causation is a slippery word, but normally it is used to describe a legal exercise. From the many events leading up to the crucial happening, the court selects one or more of them which the law regards as causative of the happening. Sometimes the court may look for the "operative" cause, or the "effective" cause. Sometimes it may apply a "but for" approach…The phrases "on racial grounds" and "by reason that" denote a different exercise: why did the alleged discriminator act as he did? What, consciously or unconsciously, was his reason? Unlike causation, this is a subjective test. Causation is a legal conclusion. The reason why a person acted as he did is a question of fact."*

63. For the tort of direct discrimination to have been committed, it is sufficient that the protected characteristic had a *"significant influence"* on the decision to act in the manner complained of. It need not be the sole ground for the decision: per Lord Nicholls in *Nagarajan* at 513A-B.

64. Moreover, as the passage from *Khan* quoted above makes clear, the influence of the protected characteristic may be conscious or subconscious. As Lord Nicholls said in *Nagarajan* at 511A-512C:

> *"All human beings have preconceptions, beliefs, attitudes and prejudices on many subjects. It is part of our make-up. Moreover, we do not always recognise our own prejudices. Many people are unable, or unwilling, to admit even to themselves that actions of theirs may be racially motivated. An employer may genuinely believe that the reason why he rejected an applicant had nothing to do with the applicant's race. After careful and thorough investigation of a claim members of an employment tribunal may decide that the proper inference to be drawn from the evidence is that, whether the employer realised it at the time or not, race was the reason why he acted as he did. It goes without saying that in order to justify such an inference the tribunal must first make findings of primary fact from which the inference may properly be drawn. Conduct of this nature by*

an employer, when the inference is legitimately drawn, falls squarely within the language of section [13]….Such conduct also falls within the purpose of the legislation. Members of racial groups need protection from conduct driven by unrecognised prejudice as much as from conscious and deliberate discrimination."

65. As Lord Nicholls said, in many cases of direct discrimination the influence of the protected characteristic is that it causes the discriminator to make, and then act on, assumptions about people who have that protected characteristic based on conscious or subconscious beliefs about, or attitudes to, such people. However, it is important to note that in this type of case, as in any other case of direct discrimination, the mind of the decision maker has been directly affected or influenced by the protected characteristic in deciding to act as they did. In most cases this is because the reason for the discriminator's assumption or belief is that the person has the relevant protected characteristic; in associative discrimination cases it is because they are associated with a person who has the protected characteristic. In such cases there is less favourable treatment because the same assumption would not be made, or belief or attitude held, about a person who did not have that characteristic or associate with a person who had that characteristic. Thus, in *R (European Roma Rights Centre) v Immigration Officer at Prague Airport (United Nations High Comr for Refugees intervening)* [2005] 2 AC 1 – which is often referred to as a case about stereotypical assumptions - there was direct race discrimination when immigration officers interrogated Roma arrivals at Prague airport more closely because the policy which they were implementing assumed that Roma people were more likely to put forward a false claim to enter as a visitor and then seek asylum: the decision as to the level of scrutiny of a given arrival depended on whether the person was or was not Roma and the criterion for differentiation between arrivals was therefore ethnic origin. The same assumption would not be made about non-Roma arrivals and there was therefore less favourable treatment.

66. However, the logic of the requirement that the protected characteristic or step must subjectively influence the decision maker is that there may be cases where the "but for" test is satisfied – but for the protected characteristic or step the act complained of would not have happened - and/or where the protected characteristic or step forms a very important part of the context for the treatment complained of, but nevertheless the claim fails because, on the evidence, the protected characteristic or step itself did not materially impact on the thinking of the decision maker and therefore was not a subjective reason for the treatment. This point

is very well established in the field of employment law generally where, for example, an employer may be held to have acted by reason of dysfunctional working relationships rather than the conduct of the claimant which caused the breakdown in those relationships (see e.g. the cases on the distinction between dismissals related to *"conduct"* and dismissals for *"some other substantial reason",* such as *Perkin v St Georges Healthcare NHS Trust* [2006] 617 CA; and the cases in relation to public interest disclosures such as *Fecitt & Others v NHS Manchester (Public Concern at Work Intervening)* [2012] ICR 372 CA and *Panayiotou v Chief Constable of Hampshire Police* [2014] IRLR 500 EAT).

67. But the point is also very well established in the field of equality law. As Underhill P (as he then was) said in *Amnesty International v Ahmed* [2009] ICR 1450 at paragraph 37, in a passage which was relied on by the Tribunal in the present case:

> *"The fact that a claimant's sex or race is a part of the circumstances in which the treatment complained of occurred, or of the sequence of events leading up to it, does not necessarily mean that it formed part of the ground, or reason, for that treatment."*

68. The decision of the Employment Appeal Tribunal in *Martin v Devonshires Solicitors* [2011] ICR 352 is a helpful illustration of this point. Here the claimant made allegations of sex discrimination against two partners in the firm of solicitors for which she worked. The fact that she had taken protected steps for the purposes of the victimisation provisions in section 27 of the Equality Act 2010 formed an important part of the circumstances leading to her dismissal. However, on the facts the Employment Tribunal found that the reason why she was dismissed was not the making of those complaints but, rather, the fact that the complaints involved false allegations which were serious, that they were repeated, that the claimant refused to accept that they were untrue and that she had a mental condition which was likely to lead to unacceptably disruptive conduct in future. The reason for the dismissal was that she was mentally ill and the management problems to which that gave rise. This therefore was not a case of victimisation.

69. The Employment Appeal Tribunal declined to interfere with this conclusion. At paragraph 22, Underhill P said this:

> *"In our view there will in principle be cases where an employer has dismissed an employee (or subjected him to some other detriment) in response to the doing of a protected act (say, a complaint of discrimination) but where he can, as a matter of common sense and common justice, say that the reason for the dismissal was not the*

complaint as such but some feature of it which can properly be treated as separable. The most straightforward example is where the reason relied on is the manner *of the complaint…"*

70. At paragraph 23 he added, in relation to the facts of the *Martin* case, that:

"…the reason asserted and found constitutes a series of features and/or consequences of the complaint which were properly and genuinely separable from the making of the complaint itself. Again, no doubt in some circumstances such a line of argument may be abused; but employment tribunals can be trusted to distinguish between features which should and should not be treated as properly separable from the making of the complaint."

71. The cases in the field of discrimination because of religion or belief are also a useful illustration. Here, the distinction between less favourable treatment because of the beliefs of the claimant and discrimination because of the manifestation of those beliefs is well established even where the beliefs and their manifestation are very closely connected. In the former case it is the fact that the claimant holds, for example, Muslim beliefs – conscious or subconscious views about Muslims - which influenced the decision maker, and there is therefore direct discrimination; in the latter case it is the manifestation of those beliefs rather than the holding of the beliefs which influences the decision maker, and the case is not one of direct discrimination although it may be indirect discrimination. Looking at the issue from the point of view of less favourable treatment, where the beliefs themselves influenced the decision, the discriminator would not have treated a non-Muslim in the same way because they would not have held Muslim beliefs; where it is the manifestation of the beliefs which influenced the decision, and the beliefs themselves did not, the alleged discriminator would have acted in the same way towards any person behaving in the same way as the claimant whatever the comparator's reasons for doing so: see e.g. *Islington Borough Council v Ladele* [2010] ICR 532 CA where the reason for the treatment of Ms Ladele was not the fact of her religious beliefs but the fact that she refused to conduct civil partnership ceremonies between same sex partners. See also, e.g. *Azmi v Kirklees Metropolitan Borough* Council [2007] ICR 1154 EAT (disciplinary action for wearing the veil at work was not "because of" the claimant's Muslim beliefs); *Chandol v Liverpool City Council* UKEAT/0298/08 (dismissal for proselytising at work not direct religious discrimination).

72. The distinction between the protected characteristic and its manifestation is also recognised in the disability discrimination legislation. Where it is the fact of the disability which influences the decision maker this will be direct disability discrimination (e.g. prejudices about people living with a particular condition: see *Stockton on Tees Borough Council v Aylott* [2010] ICR 1278 CA which concerned stereotypical assumptions about people with mental health issues). Where the reason for the unfavourable treatment is "*because of something arising in consequence of B's disability"* the case falls within section 15 of the 2010 Act. A good example is *High Quality Lifestyles v Watts* [2006] IRLR 850 where the case was not one of direct disability discrimination because the reason for the employer's actions was not the fact that the claimant was HIV positive; it was the risk of transmission of that condition to the vulnerable people with whom he worked. The case would therefore fall within section 15.

73. We add the following points in relation to this line of caselaw:

    a. The question whether the protected characteristic or step influenced the thinking of the alleged discriminator is obviously fact sensitive and will depend on the evidence in the particular case.

    b. The decided cases repeatedly emphasise that courts and tribunals will obviously need to be alive to the possibility that a respondent or defendant who claims that the prohibited ground merely formed part of context or background, and that it did not influence the decision complained of, is mistaken or untruthful. Paragraph 23 of the judgment in *Martin* (quoted above at paragraph 70) is but one example. Another is paragraph 58 of the Judgment of the Employment Appeal Tribunal in *Ezsias v North Glamorgan NHS Trust* [2011] IRLR 550 to which the Tribunal referred at paragraph 24 of its Reasons. The point was subsequently reiterated by the Mummery LJ in refusing permission to appeal in the *Ezsias* case: [2011] EWCA Civ 1440.

    c. But, by the same token, we agree with Lewis J's observation at paragraph 54 of his Judgment in *Panayiotou v Chief Constable of Hampshire Police* [2014] IRLR 500 EAT that *"there is no additional requirement that the case be exceptional"* for this line of argument to succeed. In every case the court or tribunal is required to assess the evidence in the case before it and make findings as to the subjective reasons for the treatment complained of, albeit alive to the possibility of abuse, rather than apply

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a test of exceptionality or start from the perspective that this type of argument should rarely succeed.

74. As to evidence of direct discrimination, there may be cases where there is no dispute as to the decision maker's reasons for a given decision. Assuming direct discrimination is not admitted, the dispute in this type of case will often be as to whether what appears to be a neutral reason is in fact a proxy for a protected characteristic: an example is *James v Eastleigh Borough Council* [1990] 2 AC 751 where the right to free admission to the Council's leisure pools depended on whether a person had reached the state pension age, then 60 for women and 65 for men. In the case of a member of the public aged 61 it would therefore be necessary to decide whether s/he was male or female in order to decide whether s/he was entitled to free entry. As sex would be the criterion for differentiating between them it was direct sex discrimination.

75. Where, however, there is an issue as to the alleged discriminator's reasons the court or tribunal is required to examine the evidence as to the mental processes of the alleged discriminator to identify what operated on their mind and caused them to decide to act as they did. That evidence will include the evidence of the decision-maker but it will also include the evidence as to the context in which the decision was made. The court will therefore examine all of the relevant circumstances of the case with a view to deciding whether the decision maker's professed reasons were their actual reasons. As Lord Nicholls put it in *Nagarajan* at 511B:

> *"Save in obvious cases, answering the crucial question will call for some consideration of the mental processes of the alleged discriminator. Treatment, favourable or unfavourable, is a consequence which follows from a decision. Direct evidence of a decision to discriminate on racial grounds will seldom be forthcoming. Usually the grounds of the decision will have to be deduced, or inferred, from the surrounding circumstances."*

76. Given that a prohibited characteristic may subconsciously influence a decision maker, this does not necessarily mean that the court or tribunal is merely deciding whether the evidence of the decision maker is truthful. As Lord Nicholls noted in the passages from *Nagarajan* which we have cited, the alleged discriminator may be mistaken in their denial that they acted on prohibited grounds because they have not appreciated that they were influenced by the

protected characteristic or step. The honesty of a witness who denies that they acted on prohibited grounds is therefore relevant but it cannot, of itself, be decisive. This point was emphasised in *Anya v Oxford University* [2001] ICR 847 CA where the Employment Tribunal had set out the relevant factual issues but had not reached reasoned conclusions on these issues or analysed the documentary evidence in the case, merely stating that it found the respondent's main witness to be essentially truthful and therefore accepted his evidence that he had not discriminated. Sedley LJ said at paragraph 25:

> *"Credibility, in other words, is not necessarily the end of the road: a witness may be credible, honest and mistaken, and never more so than when his evidence concerns things of which he himself may not be conscious".*

77. If the protected characteristic did significantly influence the thinking of the decision maker then the reason why it did so is irrelevant. As Lord Nicholls put it in *Nagarajan* at 511:

> *"The crucial question just mentioned is to be distinguished sharply from a second and different question: if the discriminator treated the complainant less favourably on racial grounds, why did he do so? .. the reason why the alleged discriminator acted on racial grounds is irrelevant".*

78. Direct discrimination for benign motives is as unlawful as direct discrimination for reasons of hostility, although this consideration may have a bearing on remedy because it may affect the degree of injury to feelings suffered by the claimant.

79. As Lord Nicholls said at paragraph 8 of his Opinion in *Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] ICR 337 HL, the question whether there has been direct discrimination is *"essentially a single question: did the claimant, on the proscribed ground, receive less favourable treatment than others"*. It therefore is not necessary for the court or tribunal to consider the reason why question and the issue of less favourable treatment in stages in every case:

> *"11….employment tribunals may sometimes be able to avoid arid and confusing disputes about the identification of the appropriate comparator by concentrating primarily on why the claimant was treated as she was. Was it on the proscribed ground which is the foundation of the application? That will call for an examination of all the facts of the case. Or was it for some other reason? If the latter, the application fails. If the former,*

there will be usually be no difficulty in deciding whether the treatment, afforded to the claimant on the proscribed ground, was less favourable than was or would have been afforded to others."

80. There are numerous statements in the authorities that a comparator need not be constructed in every case. By way of example, Elias LJ explained in *JP Morgan Europe Ltd v Chweidan* [2012] ICR at paragraph 5:

"In many cases it is not necessary for a tribunal to identify or construct a particular comparator (whether actual or hypothetical) and to ask whether the claimant would have been treated less favourably than that comparator. The tribunal can short circuit that step by focusing on the reason for the treatment. If it is a proscribed reason, such as in this case disability, then in practice it will be less favourable treatment than would have been meted out to someone without the proscribed characteristic.."

81. Where a Tribunal does construct a hypothetical comparator, this requires the creation of a hypothetical 'control' whose circumstances are materially the same as those of the complainant save that the comparator does not have the protected characteristic or has not taken the protected step. The question is then whether such a person would have been treated more favourably than the claimant in those circumstances. If the answer to this question is that the comparator would <u>not</u> have been treated more favourably this also points to the conclusion that the reason for the treatment complained of was <u>not</u> the fact that the claimant had the protected characteristic. This is why Elias P (as he then was) said in *Law Society v Bahl* [2003] IRLR 640 EAT (approved by the Court of Appeal [2004] IRLR 799), having rejected a submission that it is an error of law to fail to construct a hypothetical comparator, that:

"114… whilst it is not necessary for tribunals to specify with precision the hypothetical comparator, they may find it helpful provisionally to try to do so in order to identify any potentially relevant explanations which might account for the difference in treatment. Whether they do account for it or not will depend upon the evidence which emerges during the trial."

<u>Direct discrimination because of marriage in particular.</u>

Relevant legislation

82. In the light of the arguments in the appeal it is instructive to look at the relevant statutory provisions as they were originally enacted in the Sex Discrimination Act 1975 given that neither party suggests that the provisions in the 2010 Act were intended to change the law as stated in the original version of the 1975 Act. Section 3 provided:

> *"**3. Discrimination against married persons in employment field***
>
> *(1) A person discriminates against a married person of either sex in any circumstances relevant for the purposes of any provisions of Part II if:*
>
> > *(a) on the ground of his or her marital status he treats that person less favourably than he treats or would treat an unmarried person of the same sex*
> >
> > *(b)…"* (emphasis added)

83. Section 3 therefore protected married persons of either sex but not unmarried persons. The comparator for the purposes of the claim had to be a person of the same sex who was not married. The legislation therefore ensured that the control for the purposes of measuring whether the fact of the claimant's married status had led to a difference in treatment screened out the possibility that a difference in sex was the reason for any difference in treatment by requiring that comparator was a person of the same sex.

84. Section 5(3) of the 1975 Act then provided that:

> *"A comparison of the cases of persons of different sex or marital status under section 1(1) or 3(1) must be such that the relevant circumstances in the one case are the same, or not materially different, in the other."*

85. This provision aimed to eliminate the possibility that some other difference between the cases of the claimant and their comparator accounted for any difference in the treatment of them, so that the hypothetical comparison truly tested whether the protected characteristic was the criterion for differentiation of the claimant from the hypothetical comparator.

86. Similarly, section 1(2) of the 1975 Act maintained the distinction between sex discrimination and marital status discrimination as follows:

> *"**1. Sex discrimination against women.***

(1) A person discriminates against a woman in any circumstances relevant for the purposes of any provision of this Act if—

(a) on the grounds of her sex he treats her less favourably than he treats or would treat a man, or…

(b)…

(2) If a person treats or would treat a man differently according to the man's marital status, his treatment of a woman is for the purposes of subsection (1)(a) to be compared to his treatment of a man having the like marital status." (emphasis added)

87. Again, the hypothetical comparator was tightly drawn so as to isolate sex as the potential criterion for differentiation. The claimant and comparator were both required to be married and the only difference in their circumstances, given section 5(3), was required to be their sex. On this basis, if the comparator would have been treated more favourably then it would follow that the reason for this was the difference in sex between claimant and comparator given that there were no other material differences in their cases.

88. As a result of amendments to the 1975 Act pursuant to section 251(2) Civil Partnership Act 2004, with effect from 5 December 2005 section 3 provided as follows:

*"**3 Discrimination against married persons and civil partners in employment field***

(1) In any circumstances relevant for the purposes of any provision of Part 2, a person discriminates against a person ("A") who fulfils the condition in subsection (2) if—

(a) on the ground of the fulfilment of the condition, he treats A less favourably than he treats or would treat a person who does not fulfil the condition, or

(b) …

(2) The condition is that the person is—

(a) married, or

(b) a civil partner."

89. Although the drafting may have been more cumbersome, the point that the legislation protected a person against discrimination because they are married or in a civil partnership remained. By virtue of section 5(3), the comparison was with a person who was unmarried or not in a civil partnership and whose circumstances were otherwise materially the same as those of the claimant.

90. Section 8 Equality Act 2010 now provides as follows:

> *"**Marriage and civil partnership***
>
> *(1) A person has the protected characteristic of marriage and civil partnership if the person is married or is a civil partner.*
>
> *(2) In relation to the protected characteristic of marriage and civil partnership—*
>
> *(a) a reference to a person who has a particular protected characteristic is a reference to a person who is married or is a civil partner;*
>
> *(b) a reference to persons who share a protected characteristic is a reference to persons who are married or are civil partners."*

91. Section 13(4) then provides:

> *"(4) If the protected characteristic is marriage and civil partnership, this section applies to a contravention of Part 5 (work) only if the treatment is because it is B who is married or a civil partner."*

92. This confirms that the protection is of persons who are married or in a civil partnership and that the legislation protects them from less favourable treatment because of that status or, using the old terminology, on the grounds of that status.

Hawkins v Atex Group Ltd

93. The relevant legislation was helpfully analysed by Underhill P in *Hawkins v Atex Group Ltd* [2012] ICR 1315. In that case the claimant marketing director was married to the chief executive officer of a company and she lost her job as a result of an instruction from the chairman that no member of the chief executive's family should be employed by the company in an executive or professional capacity because of concerns about perceived conflicts of

interest and nepotism. Their daughter, who was the global human resources manager of the company, was also dismissed. Unsurprisingly, given that the daughter was also dismissed, the dismissal of the claimant was held not to be discrimination because of marriage.

94. Underhill P said this in relation to marriage discrimination (the underlining has been added for emphasis):

> *"**9** …In my view it is clear that (to use the terminology of the 2010 Act) the characteristic protected by section 3(1) is the fact of being married or, to put it the other way round, that what is proscribed is less favourable treatment on the ground that a person is married….The same is true of the section in its pre-amendment form: "marital status" naturally means the fact of being married. The relevant comparator is thus, likewise, a person who is not married. Since in any comparison for the purpose of the section the relevant circumstances must be the same but for the protected characteristic ..the appropriate comparator will usually be someone in a relationship akin to marriage but who is not actually married: I will use the old and well-understood, albeit much deprecated, phrase "common law spouse" rather than the modern "partner", which does not have so specific a meaning.*
>
> ***10** The paradigm case caught by section 3 is thus where a woman is dismissed—or otherwise less favourably treated—simply because she is married. Such cases may seem outlandish now, but they were very common well into the post-war era, even if they had become rarer by the time of the introduction of the 1975 Act. I think it likely that it was that kind of case that Parliament principally had in mind when section 3 was first enacted.*
>
> ***11** A rather less straightforward case is where the reason for the treatment in question comprises both the fact that the complainant is married and the identity of her husband—that is, where she is (say) dismissed not simply because she is married but because of who she is married to. On ordinary principles such a case will fall within section 3 because the fact that she is married is an essential part of the ground of the employer's action, even though the identity of her husband is an additional element. But it is important to appreciate that this will not be so in every case where a woman suffers less favourable treatment because of her relationship to her husband. It is essential that the fact that they are **married** is part of the ground for the employer's action. As Ms Sen Gupta succinctly put it, it is important to get the emphasis in the right place: the question is not whether*

the complainant suffered the treatment in question because she was married ***to a particular man****, but whether she suffered it because she was* ***married*** *to that man. Some subtleties are involved here. In many, perhaps most, cases of this kind the ground for the employer's action will not be the fact that the complainant and her husband are married but simply the closeness of their relationship and the problems to which that is perceived to give rise: applying the other half of the "two-part test" …, a common law wife would have been treated in the same way. The employer may in giving his reasons for the conduct complained of have referred to the fact that the two of them are married, or have used the language of husband and wife, but if that merely reflects the fact that in their particular case the close relationship takes the form of marriage, and he would have treated her the same if they were common law spouses, then section 3 will not apply. Deciding whether the fact that the complainant is* ***married*** *—rather than simply that she is in a close relationship with the man in question—is the ground of the employer's action…will often be easy enough; but sometimes it may be more difficult. There will certainly be some cases where the reason is indeed "marriage-specific": one example is* Chief Constable of the Bedfordshire Constabulary v Graham *[2002] IRLR 239, ...*

12 *Mr Burgher did not accept the analysis in the previous paragraph. He submitted that if in a given case the close relationship to which the employer objects takes the form of marriage there should be no need to ask anything further: the marriage is the ground of the action, irrespective of whether the complainant would have been treated the same way if she had been simply a common law spouse. …, it all depends how you define the relevant circumstances: in this case, you cannot strip out the fact of marriage and yet leave in the equation the closeness of the relationship which is an incident of that marriage. That is a seductive submission, because often (though not always) to subject a spouse to a detriment because of his or her relationship to the other spouse will be unfair, and it is natural to feel that the law should provide a remedy; but in my view it is wrong. Although marriage and a close personal relationship usually go together, they are conceptually separate and are not inevitable corollaries of one another. They are properly to be treated as separate factors.*

13 *I am reinforced in that conclusion by policy considerations. It is, I believe, commonly accepted that it will sometimes be legitimate for employers to accord different treatment to employees who are parties to a close personal relationship, for essentially the kinds of*

reasons alluded to by Atex in the present case—conflicts of interest and perceptions of favouritism, nepotism and the like; and such treatment may be "less favourable". Yet if the law were as Mr Burgher submits such treatment would be absolutely unlawful in cases where the parties in question were husband and wife, since direct discrimination is of course incapable of justification. That is not in my view a result that Parliament is likely to have intended to achieve, particularly since the identical treatment would not be unlawful (subject to any possible claim of sex discrimination or for unfair dismissal…) if the employees in question were in an equally close relationship but did not happen to be married: that seems to me an arbitrary and unacceptable anomaly. The approach which I favour, covering only cases where the employer is motivated (at least in part) by the fact of marriage as such, rather than by the closeness of a relationship which happens to take the form of marriage, seems to me essential if the law in this field is to remain principled and coherent. …."

95. The *Graham* case, to which Underhill P referred at the end of his paragraph 11, above, was one in which the claimant, a police inspector, was appointed to a post in a division of the force of which her husband was the commander. Her appointment was then rescinded by the chief constable. The principal reason for doing so, was that:

"(a) As the spouse of a serving officer she should not work in the same division because she would not be a competent and compellable witness against her spouse in any criminal proceedings"

96. This was presumably a reference to section 80 of the Police and Criminal Evidence Act 1984, which then applied solely to married persons (it now applies to civil partners as well) and which restricted the circumstances in which they were competent or compellable to give evidence against each other.

97. The other reasons given for the treatment of the claimant in the *Graham* case were:

"(b) It will be difficult for officers under her supervision to make a complaint or take a grievance against her knowing of her relationship with a Divisional Commander.

(c) It would be more difficult to deal with any possible problems relating to under performance by her because of her relationship with a Divisional Commander."

98. *Graham* was held by the Employment Appeal Tribunal to be a case of marriage discrimination on the basis that a significant reason for the treatment complained of was (a), the competence and compellability of spouses, which was a criterion based specifically on marriage. But in the context of the present case it is also instructive to look at what Underhill P said would not have amounted to direct marriage discrimination:

> *"**20** Graham is accordingly a case of direct discrimination under section 3 where the employee was less favourably treated by the application of a "marriage-specific" criterion relating to her marriage to a particular person. It is thus entirely consistent with the approach which I have advanced at paras 9–13 above. If no reference had been made to that criterion, and the chief constable's grounds had been held to be only one or both of those referred to as (b) and (c).., the position would have been different…: concerns of the kind identified under those two heads would, almost certainly, arise from the fact of a close relationship and would have led to the claimant being treated in the same way even if she and the commander had only been common law spouses."*

99. In other words, unfavourable treatment because of difficulties arising out of the fact that the claimant was married to her husband would not necessarily be less favourable treatment because of marriage. If the concern was about the close relationship, rather than marriage itself, and if an unmarried person would have been treated in the same way in materially the same circumstances, the claim in *Graham* would have failed.

Conclusions in relation to Hawkins v Atex Group Ltd

100. We respectfully agree with the analysis of the law in *Hawkins* which was based on the application of orthodox direct discrimination principles. The passages which we have highlighted make clear that what the court or tribunal is deciding, where the claim is direct marriage or civil partnership discrimination, is whether the alleged discriminator was consciously or subconsciously influenced by their views or assumptions about, or attitudes to, marriage or civil partnership as distinct types of human relationship. In many cases it will therefore be helpful to ask whether, had the claimant and their partner been unmarried, or not in a civil partnership, but the circumstances were otherwise materially the same, they would have been treated more favourably. This approach will tend to ensure that the specific question whether the particular relationship of marriage or civil partnership was a significant

reason for the treatment complained of, is addressed and answered. Ms Monaghan did not disagree with this analysis of the law when it was put to her by the Appeal Tribunal.

101. Teasing out the consequences of this point, there may be cases where assumptions or beliefs about marriage mean that conduct which would be regarded as acceptable for an unmarried person is regarded as unacceptable for a person who is married. This might be the result of the alleged discriminator holding beliefs about marriage in the context of their religious convictions, although it need not be. Examples include views about sexual fidelity in the context of marriage, or about separation or taking steps to divorce (though not the fact that a person is divorced given that the protection is of people who are married), and views about same sex marriage in a case where the conscious or subconscious objection is not to the fact that the person is gay but to the fact that they have entered into a marriage (although this might be sexual orientation discrimination as well: see *Pemberton v Inwood* [2018] ICR 1291 CA). Where a person would not have treated an unmarried person who acted in the same way in the same circumstances (e.g. an unfaithful partner, or a person who was splitting up with their partner, or a person in a gay relationship) they have treated the married person less favourably, almost certainly because of their conscious or subconscious attitudes to or assumptions about marriage, and this will be direct marriage discrimination. Again, we did not understand Ms Monaghan to disagree with this analysis.

102. We therefore accept that if, in the present case, the Tribunal had concluded that any behaviour of the claimant which was a significant reason for his dismissal would not have been a significant reason for his dismissal in a case where the circumstances were materially the same, but the claimant was not married to his wife, his claim ought to have succeeded. Similarly, we also accept that if the Tribunal had found that a significant reason for the dismissal of the Claimant was that the Trustees believed that the nature of marriage is such that a vicar whose marriage broke down or had marital difficulties could not continue in office, the discrimination claim would likely have succeeded assuming that their belief was about marriage in particular rather than breakdowns in sexual relationships in general. That would be a belief about marriage which was a significant reason for the treatment of the Claimant. Again, we understood Ms Monaghan to agree.

Was Gould (No 1) correctly decided?

103. All of this being so, we agree with the decision in *Gould v Trustees of St John's Downshire Hill (No 1)* UKEAT/0115/17 and are unsurprised that permission to appeal was refused by

A the Court of Appeal. Here, as noted above, the issue was whether the Claimant's pleaded case was misconceived in law, and therefore bound to fail even if he could establish the facts which he alleged. The Respondent argued that since the Claimant apparently accepted that the reasons for his dismissal which arose out of his marriage were based on his marital difficulties, rather than the fact that he was married, he could not establish a case of marriage discrimination.

B

104. Simler J reviewed the Claim Form and pointed out, for example, that:

C

a. At paragraph 77, the Claimant pleaded: "*The following list of points is relied upon as evidence for the contention that [the Claimant's] marriage is the real underlying reason for his dismissal.*." (emphasis added)

D

b. At paragraph 78, he pleaded: *"For the reasons set out above [the Claimant] alleges that the real reason for his dismissal was the difficulties in his marriage. If he were not married, he would not have been dismissed*.." (emphasis added)

105. At paragraph 25, Simler J said:

E

> *"At paragraphs 74 to 78 the Claimant refers to evidence on which he relies to support his contention that marriage was the real underlying reason for his dismissal. Particular points are listed serially at paragraph 77. Although at paragraph 78 the Claimant says that the real reason for his dismissal was the difficulties in his marriage, that sentence cannot be read in isolation. He goes on to say that if he were not married he would not have been dismissed and that as a result he contended that he had been directly discriminated against on the ground of marriage."*

F

106. She added, at paragraph 26, that:

G

> *"26 Although Mr Cordrey now realistically accepts that the Claimant did not expressly disavow any reliance on the status of marriage in that paragraph, he submits that was the natural reading of his pleading. I disagree. It seems to me to follow from the passages to which I have referred that the difficulties in the Claimant's marriage were, on his pleaded case, only significant to the Respondent because there was a marriage in which there could be difficulties. Paragraph 78 and other passages in his pleaded case make clear his contention that the decision to dismiss him depended on the fact that he was married and having marital difficulties, with the*

H

emphasis on 'marital' rather than 'difficulties'. The reason marriage difficulties were problematic for the Respondent flowed from the importance attached to the institution of marriage by this church employer on his case.

27 On the Claimant's case, the decision makers had a particular view of marriage and the behaviour that could be tolerated or not in a married person…" (emphasis added)

107. At paragraph 32, Simler J pointed out that:

"…..The context here is an employer who holds marriage in particular regard and for whom on the Claimant's pleaded case the fact that he was married and had marital difficulties played a significant part in the reason for his treatment."

108. Simler J was not deciding anything more than that, as she read the Claimant's pleaded case, he was alleging that the issues which he and his wife had, and his conduct in relation to those issues, were viewed in a particular way because he and his wife were married and because of the Respondent's views about the institution of marriage: to similar effect, see paragraphs 31 and 36. If the Claimant's factual case was accepted on the evidence it would therefore be open to the Tribunal to find that he was the victim of marriage discrimination. It therefore could not be said that his claim was legally misconceived.

109. Given Ms Monaghan's reliance on paragraph 36 of Simler J's Judgment, we should perhaps deal with it specifically. She concluded:

"Thus for all those reasons the Employment Judge was wrong to conclude that this case did not engage the protected characteristic in section 8 of marriage. On a reasonable reading of the Claimant's pleaded case, the facts give rise to an arguable case that it was his married status and his marital difficulties as a married man that led to his dismissal. That composite reason was, on his case, the reason for the Respondent's treatment of him and that case should have been permitted to proceed….." (emphasis added)

110. The phrase *"composite reason"* was relied on by Ms Monaghan to argue that the Tribunal, in effect, found that the Claimant was dismissed for a composite reason, namely his marital status and his marital difficulties, and that this amounted in law to a finding of direct marriage

discrimination. We disagree. What we understand Simler J to have been saying was that if the reasons for the Claimant's dismissal were his marital status and his marital difficulties *'as a married man'* - i.e. difficulties which would not be regarded in the same way if he was not married to his wife - then the Claimant could win. She was not introducing a new *"composite"* protected characteristic of *"marital status and having marital difficulties"*.

111. Mr Cordrey argued, in the alternative to his primary case, that *Gould (No 1)* gave an interpretation of the concept of direct marriage discrimination which was too expansive and was not intended by Parliament. He said that the law was concerned to protect people from discrimination on grounds of married status but not on the grounds of the state of their marriage. The law in this area was enacted with antiquated practices, such as forbidding marriage by female flight attendants or civil servants in mind, and it should not apply beyond this type of case. It does not cover less favourable treatment because of marital breakdown.

112. We do not agree for the following reasons:

a. We note that our view is that less favourable treatment because of marital difficulties or a breakdown in an employee's marriage may be marriage discrimination. The concept of less favourable treatment in this context contemplates that a person who was in a similar relationship but not married would have been treated more favourably in materially the same circumstances. This is not an expansive reading of the legislation and it does not mean that unfavourable treatment because of marital difficulties or breakdown will necessarily be marriage discrimination, as we have made clear.

b. Our analysis, and that of Underhill P and Simler J, is based on the application of well-established general principles of direct discrimination and the particular words of the statutory provisions under consideration. There did not appear to us to be any basis for Mr Cordrey's assertions about the scope of the protection for married persons in the language of the relevant statutory provisions or in the case law.

c. We remained unclear as to what principle Mr Cordrey was contending for, or relying on, and what the boundaries or implications of his approach were for the law in this area. Again, we saw this as a consequence of his attempting to apply a narrower approach than was required by the words of the legislation, on the basis of anecdotal evidence as to the sorts of cases which were believed or known to occur in society when the marriage discrimination provisions were first enacted in 1975. We were also

unclear how this approach fitted with the fact that civil partnerships became a protected characteristic 20 years later given that the protection from discrimination for civil partners cannot have been intended to be more generous than that which is available to married persons.

Schedule 9 to the 2010 Act: Occupational requirement defences

113. There was a certain irony in the fact that the Respondent, which strongly believes in the institution of marriage, was contending for less protection from marriage discrimination for married persons. But if the concern which underpinned Mr Cordrey's submission that *Gould (No 1)* was too expansive was that religious organisations would no longer be able to apply occupational requirements based on their beliefs about marriage, or to hold married employees to a different standard, Schedule 9 to the 2010 Act allows them to do so in defined circumstances. These include Schedule 9 paragraph 2(4), which permits the imposition of the following conditions on employment for the purposes of an organised religion provided the requirement engages the compliance or the non-conflict principle:

> *"(c) a requirement not to be married or a civil partner;*
>
> *(ca) a requirement not to be married to, or the civil partner of, a person of the same sex;*
>
> *(cb) a requirement not to be the civil partner of a person of the opposite sex;*
>
> *(d) a requirement not to be married to, or the civil partner of, a person who has a living former spouse or civil partner;*
>
> *(e) a requirement relating to circumstances in which a marriage or civil partnership came to an end;"*

114. Paragraphs 2(5) and (6) provide as follows:

> *"(5) The application of a requirement engages the compliance principle if the requirement is applied so as to comply with the doctrines of the religion.*
>
> *(6) The application of a requirement engages the non-conflict principle if, because of the nature or context of the employment, the requirement is applied so as to avoid conflicting with the strongly held religious convictions of a significant number of the religion's followers."*

115. We appreciate that the conditions which it may be permissible to apply are more limited in scope than a general entitlement to treat married persons less favourably on grounds of

marriage, even in relation to employment for the purposes of an organised religion where the compliance or the non-conflict principles are engaged. But these are the lines which Parliament has drawn after careful consideration and, it may be said, significant consultation with the Church of England, including in the context of the Marriage (Same Sex Couples) Act 2013 which led to paragraph 2(4)(ca).

116. In this connection, and for completeness, nor do we think it appropriate to reason backwards that the scope of the defences under Schedule 9 necessarily delineates the scope of the concept of direct marriage discrimination and, in particular, shows that the concept is broader than we have said. In her oral submissions, Ms Monaghan argued for the first time that the right to impose "*a requirement relating to circumstances in which a marriage or civil partnership came to an end"* under paragraph 2(4)(e) must have been enacted because to impose such a requirement would otherwise necessarily be unlawful direct marriage discrimination.

117. The predecessor to paragraph 2(4)(e) was section 19(4) Sex Discrimination Act 1975. At the time of the enactment of the 2010 Act this provided, under the heading *"Ministers etc"* that the potentially permissible requirements included, where they were imposed in relation to employment for the purposes of an organised religion and the compliance principle or the non-conflict principles applied, that it was permissible to apply:

> *"(d) a requirement, applied in relation to a person who is married, or is a civil partner, that relates—*
>
> *(i) to the person, or the person's spouse or civil partner, not having a living former spouse or a living former civil partner, or*
>
> *(ii) to how the person, or the person's spouse or civil partner, has at any time ceased to be married or ceased to be a civil partner."* (emphasis added)

118. This, Ms Monaghan submitted, showed that the scope of the concept of direct marriage discrimination necessarily included unfavourable treatment because of marital difficulties. She then developed this argument in her subsequent written submissions.

119. We do not agree for the following reasons:

a. We note that the defence contemplates that the person has remarried, which is not this case. This was explicit under the 1975 Act as section 19(4) expressly stated that the defence might be available where the requirement was applied to a married person

and where a (previous) marriage or civil partnership had come to an end. But it is also implicit in the defence under Schedule 9 of the 2010 Act, at least if the complaint is one of direct marriage discrimination, because this type of claim can only be brought by a person who was married at the time of the act complained of and the defence applies where a marriage has ceased and the concern is about the circumstances in which it did so.

b. Second, as a matter of principle reasoning backwards from the availability of the defences under Schedule 9 is a potentially unreliable line of reasoning where the legislation under consideration brings together a number of different statutory provisions and the defence applies to direct discrimination claims (see paragraph 6(2)) based on any of the characteristics protected by the legislation albeit some types of claim are more likely than others. This is particularly so where the law in relation to some types of direct discrimination is new, or developing, or relatively unexplored in the case law and where the range of religious beliefs which may result in discrimination is uncertain. Parliament may not itself have considered the precise scope of the causes of action and may simply have wished to make clear that certain actions based on religious beliefs will be permitted. In this instance it appears that Parliament wished to make clear, as it had in the Sex Discrimination Act 1975, that it would be permissible to reject, for example, a minister where their marriage had broken down because of their behaviour e.g. because they had committed adultery. This reflected (although not entirely accurately) the doctrines of the Church of England about divorced ministers, but it may have been considered potentially relevant to other religions and roles as well.

c. Third, even assuming that paragraph 2(4)(e) of Schedule 9 was enacted with direct marriage discrimination specifically in mind, this is not inconsistent with our analysis of this concept. Parliament may well have envisaged that there would not be direct marriage discrimination, even under the Sex Discrimination Act 1975, if the same requirement would also have been applied to unmarried persons, in which case the defence would not be required. If, however, the requirement was only applied to married persons then it would be direct marriage discrimination and the defence would potentially 'come in to play'. The existence of the defence is therefore perfectly consistent with our view that unfavourable treatment by reason of marital difficulties is not, of itself, marriage discrimination: whether it is will depend on whether the fact

that the claimant was married at the time of the act complained of was a significant reason for the application of the condition whereas an unmarried person with similar difficulties would have been treated more favourably.

d. Fourth, on Ms Monaghan's argument, if for example the concern with the employee was that his previous marriage had ended because of him being violent to his wife this would necessarily be direct marriage discrimination even if there would have been the same concern about any employee who had been violent to a partner or family member. The defence under Schedule 9 would, however, only be available in cases of employment for the purposes of an organised religion etc. In any other case, the employer would be liable. This cannot be what Parliament intended.

e. Finally, if Ms Monaghan is right then there would be direct marriage discrimination where there was unfavourable treatment on grounds of the reasons for the breakdown of the previous marriage but not where it was on grounds of a separation without divorce given that the defence does not apply to unfavourable treatment for this reason. We cannot see what principle would lead to the conclusion that this line could be drawn in relation to the concept of direct marriage discrimination although we can see why there might be policy reasons for limiting the defence in this way.

Burden of proof

120. Section 136 provides, so far as material as follows:

> *"(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.*
>
> *(3) But subsection (2) does not apply if A shows that A did not contravene the provision."*

121. The equivalent provisions in the legacy enactments were considered in *Igen Ltd (formerly Leeds Carers Guidance) v Wong* [2005] ICR 931 CA and *Madarassy v Nomura International plc* [2007] ICR 867 CA, both of which were approved by the Supreme Court in *Hewage v Grampian Health Board* [2012] ICR 1054 UKSC.

122. For reasons which will become apparent, we do not propose to embark on a detailed discussion of the case law in this area. We note, however, that:

a. In *Igen v Wong* the Court of Appeal accepted that once a prima facie case has been established it is for the respondent to show that there has been *"no discrimination whatsoever"*. Ms Monaghan agreed that, particularly given that the marriage discrimination legislation does not derive from EU law, and therefore the EU provisions from which the *"no discrimination whatsoever"* formulation derives (i.e. the formulation of the equal treatment principle in various directives) do not strictly apply, a respondent which shows that the protected characteristic did not have a significant influence on the decision complained of has succeeded in showing that there has been *"no discrimination whatsoever"*. Putting the point in the terms of section 136(3) of the 2010 Act, in such a case the respondent has shown that it *"did not contravene"* section 13 read with sections 8 and, for example, 39.

b. In *Hewage v Grampian Health Board* Lord Hope said, at paragraph 32:

> "*it is important not to make too much of the role of the burden of proof provisions. They will require careful attention where there is room for doubt as to the facts necessary to establish discrimination. But they have nothing to offer where the tribunal is in a position to make positive findings on the evidence one way or the other."*

c. In *Khan v Royal Mail Group* [2014] IRLR 947 CA the fact that an employment tribunal had been able to make a positive finding of fact, on the evidence, that the employer had not acted on prohibited grounds, meant that the burden of proof provisions *'had nothing to offer'*.

d. We do not agree with Mr Cordrey's suggestion that, in direct discrimination cases, parties may simply invite an employment tribunal to decide the reason why question rather than to apply the burden of proof provisions. This is not the point which was being made in *Shamoon* and subsequent cases, discussed above, which was that courts and tribunals need not consider the reasons for a decision and whether there was less favourable treatment in two stages given that ultimately there is really only one question. The very point of the burden of proof provisions is to allocate the burden of proving the reason why and that there has been no less favourable treatment, so addressing the reason why question and applying the burden of proof provisions should not be seen as alternatives.

e. Where, however, it is conceded that there is a prima facie case of direct discrimination or there plainly is one, courts or tribunals may wish to concentrate on the respondent or defendant's explanation for the treatment complained of i.e. to focus on the second stage of the burden of proof provisions and what the respondent or defendant has succeeded in proving or failed to prove. However, they should do so on the clear basis that since there are facts from which an inference of discrimination could be drawn, a lack of evidence to show that there was no discrimination will lead to the claim succeeding.

The Appellant's arguments.

123. In her skeleton argument, Ms Monaghan grouped her grounds together under a series of headings. We will take each of the Claimant's complaints about the Tribunal's decision, as explained in her skeleton argument and developed orally, in turn.

Did the Tribunal apply the wrong test?

124. Ms Monaghan's first argument was that the Tribunal applied the wrong test in deciding the reason why question. She submitted that various references by the Tribunal to the reason for the actions of the Respondent not being marriage or the breakdown of the marriage *"per se"* (see for example paragraph 228 of the Reasons, cited at paragraph 53 above) – which she translated as meaning *"by itself"* - amounted to the application of a sole reason test whereas the issue was whether marriage was a significant influence on the decision to dismiss. In her written submissions after the hearing Ms Monaghan relied for the first time on passages from the decision of the Employment Appeal Tribunal in *O'Neill v Governors of St Thomas More RCVA Upper School* [1996] ICR 33 to support this aspect of the appeal.

125. We reject this submission for various reasons.

126. First, the point that the protected characteristic need not be the sole influence is elementary and well established. It is clear from the Tribunal's Reasons as a whole that it was well aware of this point.

127. Second, *"per se"* means *"by or of itself"* or *"as such"*. The Tribunal referred to marriage or the breakdown *"per se"* when it was drawing a contrast with the manifestation of the marital difficulties in the form of behaviour and/or the impact of that behaviour. It was expressing the distinction, discussed above, between cases where it is the status of marriage which influenced the decision maker and cases where it is conduct, albeit related to marital

breakdown, which did so. As we have noted, at paragraph 13 or his Judgment in *Hawkins* Underhill P said that the legislation covered "*only cases where the employer is motivated (at least in part) by the fact of marriage as such*". This is the distinction which the Tribunal was intending to convey and, as discussed above, it is a distinction which is well established in the field of employment and discrimination law. As we have also noted, in its self-directions on the law, the Tribunal specifically cited paragraph 37 of the decision in *Amnesty International v Ahmed* [2009] ICR 1450, which we have quoted at paragraph 67 above, and which makes the point that the fact that the protected characteristic was part of the circumstances which led to the treatment complained of does not necessarily mean that it formed part of the reason for that treatment.

128. Third, the Tribunal was taken to the relevant case law including *Nagarajan*, *Khan*, *Ahmed* and *Hawkins* and submissions were made by experienced Counsel. It directed itself correctly in relation to the concepts of direct discrimination and direct marriage discrimination, albeit it did not explicitly refer to the significant influence test. It had also read the Judgment of Simler J which contained a clear exposition of the law including the following passage at paragraph 16:

> *"as with other protected characteristics, the fact of being married need not be the only or main reason for the treatment. If the fact that a claimant is married plays an operative part in the reason or reasons the employer has for treating that person less favourably, that is sufficient to engage the protection."*

129. Fourth, the Tribunal's Reasons reflect the way in which the case was argued on behalf of the Claimant. His case was not based on nuances: he presented a straightforward factual issue for the Tribunal, namely whether the real reason for the dismissal had been a belief that *"broken marriage equals broken ministry"* or whether it had been the breakdown in relationships between the various protagonists.

130. Fifth, it is plain that the Tribunal did <u>not</u> apply a sole reason test. No doubt with the significant influence test in mind, as we have highlighted above, the Tribunal made clear in its section on unfair dismissal that the fact that the Claimant was married did not even partly count against him: see paragraphs 214 and 231. As we have also noted, at paragraph 252 it specifically found in relation to the discrimination claim that:

> *"the reason for dismissal was not, <u>in any way</u>, because of the claimant's marriage, his marriage difficulties, his potentially imminent separation/divorce or any combination of*

these three things. Rather, it was entirely because of the irretrievable breakdown in the relationship between the claimant and the trustees, LT, certain members of staff and other members of the congregation." (emphasis added)

131. Finally, as to Ms Monaghan's reliance on *O'Neill* this was the case in which a teacher of religious education and personal relationships at a Roman Catholic school became pregnant as a result of a relationship with a Roman Catholic priest and consequently was not permitted to return to the school after the birth of her child. The industrial tribunal dismissed her sex discrimination claim on the ground that she had not been dismissed because she was pregnant but because the pregnancy was by a Roman Catholic priest and had become public knowledge, making her position as a teacher of religious education untenable. This was overturned by the Employment Appeal Tribunal. Mummery J (as he then was) said:

"Dismissal for pregnancy is on a ground of sex. Pregnancy is unique to the female sex. The concept of "pregnancy per se" is misleading, because it suggests pregnancy as the sole ground of dismissal. Pregnancy always has surrounding circumstances, some arising prior to the state of pregnancy, some accompanying it, some consequential on it. The critical question is whether, on an objective consideration of all the surrounding circumstances, the dismissal or other treatment complained of by the applicant is on the ground of pregnancy. It need not be only on that ground. It need not even be mainly on that ground. Thus, the fact that the employer's ground for dismissal is that the pregnant woman will become unavailable for work because of her pregnancy does not make it any the less a dismissal on the ground of pregnancy. She is not available because she is pregnant. Similarly, in the present case, the other factors in the circumstances surrounding the pregnancy relied upon as the "dominant motive" are all causally related to the fact that the applicant was pregnant — the paternity of the child, the publicity of that fact and the consequent untenability of the applicant's position as a religious education teacher are all pregnancy based or pregnancy related grounds."

132. We see the point that there is a similarity between Mummery J's remarks and Ms Monaghan's argument in the present case, but the similarity is, with respect, superficial:

a. The key point in this regard is that the Appeal Tribunal was applying the then recent decision of the European Court of Justice in *Webb v. Emo Air Cargo (U.K.)* [1994] I.C.R. 770 which had held that, because pregnancy is unique to women, unfavourable

treatment for reasons of pregnancy or related to pregnancy is necessarily sex discrimination. It is neither necessary nor permissible to ask whether a man who had an analogous condition would have been treated in the same way. This conclusion reflected particular policy considerations which apply specifically to pregnant workers and workers on maternity leave and, indeed, European legislation (the Pregnant Workers Directive 92/85/EEC) which gave them particular rights. The general principles of discrimination law therefore do not apply in the same way to pregnant workers and, indeed, their rights continue to be governed by a distinct statutory regime (see, for example, the fact that section 18 of the Equality Act 2010 is not subject to section 23(1) as it provides a definition of discrimination which applies specifically to unfavourable treatment because of pregnancy or maternity, rather than such cases being decided under the generally applicable definition of direct discrimination under section 13 read with 23(1)).

b. Attempts to extrapolate from the case law on pregnancy discrimination in order to inform general principles of direct discrimination law are therefore, with respect, flawed. Whereas the law does not distinguish between pregnancy and the impact of pregnancy, or require a comparison with an analogous male comparator, sections 13 and 23(1) do apply to marriage discrimination cases just as they do to other types of direct discrimination claim. Moreover, no meaningful analogy can be drawn between the position in society and the workplace of pregnant workers and women on maternity leave on the one hand, and the position of people who happen to be married on the other.

c. We take the point that Mummery J interpreted references by the industrial tribunal to pregnancy "per se" as suggesting that pregnancy had to be the sole reason for the treatment complained of. But that was in the context of the arguments and the decision in that particular case, where the tribunal appeared to have accepted that pregnancy was a significant reason, but the claim had nevertheless failed. As we have said, in the context of the arguments and the Reasons in the present case that is not what the Tribunal meant, nor the test which it applied.

d. Finally, we note that *O'Neill* was decided before the clarification of the approach to the reason why question in *Nagarajan* and *Khan*. Some passages from what Mummery J said on this topic, suggesting that the test is one of causation and therefore

an objective one, should therefore be read with this in mind even when applying section 18 of the 2010 Act. For a modern account of the application of the "because of" test in section 18, see the decision of Simler J in *Interserve FM Ltd v Tuleikyte* [2017] IRLR 615 EAT which turned on the distinction between absence on maternity leave as the context for the treatment complained of, and such absence as a reason for that treatment.

Did the Tribunal's findings amount, in law, to a finding of direct marriage discrimination?

133. Ms Monaghan argued that the Tribunal had found that the *"fact of the Claimant's marriage and its breakdown (a composite reason) was one of the reasons for the irretrievable breakdown in the relationship of trust and confidence"* and that this was in effect a finding of direct marriage discrimination given that marriage only need be a significant reason for the treatment complained of. We have dealt with, and rejected, reliance on the idea of a *"composite reason"* as altering in any way the statutory concepts, as explained in the case law, which are required to be applied. However, the finding at paragraph 224(13), on which Ms Monaghan placed particular reliance, did give us pause for thought. The Tribunal said this (emphasis added):

> *"(13) The effect of the claimant's marital difficulties impacted significantly on trust and confidence in that the failing marriage was the background to many of the trust and confidence issues in many respects including:*
>
> *i. It was divisive among the congregation as the claimant and his wife sought to engender support with the claimant ostracising those who took the "wrong" side;*
>
> *ii. It demonstrated a lack of integrity (a critical requirement of a Christian leader) with the claimant preaching one thing about marriage but actually acting differently in relation to his own and indeed using the pulpit to criticise those in the LT who had raised concerns about him (e.g. his preaching on Job);*
>
> *iii. He sought to isolate his wife through his controlling behaviour and there was a lack of Christian love, humility and compassion and how he treated her; and*
>
> *iv. It brought the church into public disrepute among non Christians, e.g. when*

the husband of one member of the congregation had become aware of the marriage situation and had questioned one of the LT members about it."

134. Ms Monaghan argued, particularly with reference to the passage highlighted from paragraph 224(13)(ii) above, that the reference to what amounted to hypocrisy in preaching about marriage reflected a view that a minster could not, with integrity, extol the institution of marriage if his own marriage had failed i.e. *"broken marriage equals broken ministry"*. We accept that there may have been some members of the congregation who thought that he was a hypocrite for this reason but it also appears from the Tribunal's findings that the perception of hypocrisy was attributable in large part to his failure to behave towards his wife in the way that he preached spouses should behave towards each other. In other words, the concern in relation to preaching about marriage was in large part about his conduct toward his wife as a result of his falling out with her. The charge of hypocrisy was therefore one which might be levelled at any minister who did not practise what they preached in relation to behaviour towards other human beings, as opposed to one which could only be levelled at a married minister. There were also clearly allegations of lack of integrity in using the pulpit to wage war with the Leadership Team which were only, at best, very indirectly linked to the question of his marital difficulties.

135. Furthermore, paragraph 224(13) itself was prefaced with the words: *"The effect of the claimant's marital difficulties impacted significantly on trust and confidence in that the failing marriage was the background to many of the trust and confidence issues.."* (emphasis added) and subparagraph (ii) referred to him *"acting differently in relation to his own"* i.e. what contributed to the loss of trust and confidence was the Claimant's conduct in the context of his failing marriage rather than the failure of the marriage itself. Similarly, the other three examples in paragraph 224(13) are examples of the consequences of the Claimant's behaviour arising out of his very public falling out with his wife.

136. In the end, however, it is important to recall that because dismissal was the only act of discrimination complained of, what mattered was the Trustees' reasons for their decision on 1 August 2016. Looking, then, at what the Tribunal was seeking to demonstrate by its examples in paragraph 224(13) and in the other 24 examples which it set out, paragraph 224 was prefaced with the words: *"there is an overwhelmingly large amount of evidence of such a breakdown:"*. The 25 sub-paragraphs summarised the evidence that there was such a breakdown in relationships with a range of different members of the congregation. The

Tribunal then went on, at paragraphs 226-232 and 252 of its Reasons, to consider what it referred to as the second question, namely the Trustees' reasons for the dismissal. So paragraph 224(13) was a summary of part of the evidence which showed that there had been a breakdown in relationships with members of the congregation, rather than a finding as to the Trustees' reasons for dismissal. These, it found, were *"not even in part"* because of the Claimant's marriage.

137. As we read paragraph 224(13), therefore, the Tribunal understood and applied the distinction, discussed above, between a protected characteristic being an important part of the context, or a "but for" cause of the treatment complained of, and it being a subjective reason for that treatment. This was the distinction relied on by the Respondent and it is the distinction flagged up by the Tribunal by its reference to *Ahmed* in its self-directions of law, and then explored in detail in the evidence and the Tribunal's Reasons. In the Tribunal's view there clearly was a breakdown in relationships and that clearly was the Trustees' entire reason for their decision. The fact that the issues to some extent arose in the context of the breakdown of his marriage did not mean that in law the decision to dismiss was *"because of marriage"*.

Did the Tribunal err in failing to apply section 136 of the 2010 Act?

138. The complaint here was that the Tribunal did not sufficiently address or apply the burden of proof provisions and, in particular the *"no discrimination whatsoever test"*. Ms Monaghan also argued that the Tribunal should have adopted a two stage approach in setting out its Reasons asking, first, whether there was a prima face case and, if so, second, whether the Respondent had discharged the burden of proving that it had not contravened the relevant statutory provisions.

139. We have made observations on the law relating to this topic above. Here, the Tribunal did in fact refer to the burden of proof provisions at paragraph 45:

> *"45. In relation to direct marriage discrimination, the burden of proof rests initially on the employee to prove on the balance of probabilities facts from which the tribunal could decide, in the absence of any other explanation, that the employer did contravene that provision. To do so the employee must show more than merely that he was subjected to detrimental treatment by the employer and that the relevant protected characteristic applied. There must be something more. If the employee can establish this, the burden of proof shifts to the employer to show that on the balance of probabilities it did not contravene that provision. If the employer is unable to do so, we must hold that the*

provision was contravened and discrimination did occur. We were referred by Mr Sendall to the well-known provisions of Igen Ltd v Wong [2005] IRLR 258 in this respect, which we do not repeat here."

140. Mr Sendall had in fact set out the full text of the *Igen v Wong* guidance in his written submissions.

141. It is true that the Tribunal did not then separately address whether there was a prima facie case and, if so, whether the Respondent had discharged the burden of proof, but we do not accept that it was obliged to do so. The Tribunal, rightly in our view, did not suggest anything other than that there was a prima facie case of marriage discrimination. Rather, it effectively assumed that there was and proceeded to address the question what the Respondent had proved as to its reasons for dismissal. This included examining, in turn, each of the documents relied on by the Claimant as being direct evidence of marriage discrimination, and the Respondent's explanation for each of them in the context of the evidence as a whole. The Tribunal was able to make clear findings on the evidence and it therefore was not a case in which the Tribunal was required to adopt a two stage approach as a matter of law or, indeed, in giving its Reasons. Indeed, it would have been artificial and cumbersome to attempt to separate out those aspects of the evidence which led to the conclusion that there was a prima facie case and the Respondent's explanation for those aspects of the evidence.

142. Ms Monaghan criticised the Tribunal for looking at each allegedly incriminating document in turn and deciding what it meant. She said that, as a result, the Tribunal had failed to stand back and look at the whole picture. We do not agree. The Tribunal did both, as we have explained: having set out a very detailed chronological narrative it then made an overall assessment of what the evidence showed and it summarised its reasons for that assessment at paragraphs 224-232 and 252.

143. Ms Monaghan also drew our attention to the contents of the relevant documents on the basis that they showed that there was undoubtedly a case to answer. We rather suspected that this was little more than an attempt to demonstrate the strength of the Claimant's case by rearguing the facts but, in any event, the Tribunal clearly accepted that there was a prima facie case as we have explained. We also note that it accepted that some of the documents did indeed show the potentially discriminatory attitudes contended for by the Claimant and it took this into account in its overall assessment of the evidence.

144. As to Ms Monaghan's complaint that the Tribunal did not have the "*no discrimination whatsoever"* standard in mind, we disagree. As we have noted, it had the *Igen v Wong* guidance well in mind and referred to it. The Tribunal also expressly made findings as to whether the protected ground had been any *"part"* of the reason for dismissal and found that it had not been. In our judgment it did so precisely because it was aware of the law on this issue and, in any event, its finding that marriage was not even part of the reason for the dismissal of the Claimant amounted to a finding that there was no discrimination whatsoever.

145. Finally, in this context Ms Monaghan complained that the Tribunal had not constructed a comparator. In our discussion of the law we have pointed out that this was not an error of law as the Tribunal was quite entitled to deal directly with the reasons for the dismissal of the Claimant. We agree, however, that it would have been useful for the Tribunal to ask itself whether, had the Claimant not been married to his wife but the facts had otherwise been materially the same, the Claimant would have been dismissed. It is clear from the Tribunal's Reasons, however, that if it had asked this question the answer would have served to confirm, rather than call into question, what the Tribunal had found as to the reasons for dismissal. The Tribunal plainly and unsurprisingly considered that any vicar, whether married or unmarried, who had behaved as the Claimant did would have been dismissed in the circumstances of the present case.

Did the Tribunal make contradictory findings?

146. This argument depended on our accepting Ms Monaghan's proposed analysis of paragraph 224(13) of the Tribunal's Reasons (i.e. that this paragraph amounted to a finding that marriage was a significant reason for the decision to dismiss), as the foundation for an argument that therefore it was in conflict with the Tribunal's conclusions as to the reason for dismissal at paragraph 231 of the Reasons. Since we do not accept that analysis of paragraph 224(13) for the reasons given above, the argument fails.

Did the Tribunal make the *Anya* error?

147. This argument is based on the Tribunal's findings as to the credibility of Mr Chitra. Early in its Reasons the Tribunal explained its assessment of the witnesses who had given evidence. In relation to the Claimant it was scathing, describing him as *"unduly evasive throughout"*, failing to answer *"even the most basic of questions"*, and *"rarely straightforward"*. For reasons which it explained at paragraph 50, its position was that:

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"we are extremely sceptical about the reliability of any of the claimant's evidence, except where it is undisputed or backed up by contemporaneous documentation"

148. On the other hand, the Tribunal found the Respondent's witnesses to be reliable and credible. Mr Chitra, in particular, was found to be *"one of the most open and honest witnesses from whom we have ever heard."*. Importantly, he had been entirely open with the Tribunal that he did, indeed, believe that *"broken marriage ought to equal broken ministry"* and that he had expressed this view orally and in writing on various occasions. As the Tribunal explained at paragraph 49:

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"There was no guile or even any guardedness in his responses to questions; his answers were forthright, immediate and full. He had no hesitation in admitting things which were potentially adverse to the respondent's case, for example that his theological view of marriage was such that he considered, except in exceptional cases, that the end of marriage for a minister should lead to the end of his ministry; even though he said that his view had softened over the course of the events of this case leading up to the dismissal of the claimant, when asked to what extent, he said merely that it went down from 95% to 90%."

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149. Mr Chitra's evidence, however, was that he had not acted on this belief when the decision to dismiss was taken. When he received Bishop Broadbent's instruction, on 2 November and again on 2 December 2015, he was careful to obey that instruction and did obey it in that he excluded this view from his deliberations in relation to the question whether the Claimant should be dismissed. Indeed, the Claimant's marriage and its breakdown had not even been discussed at the meeting of the Trustees on 1 August 2016. The Tribunal accepted this evidence as is apparent from paragraph 229 of the Reasons, which we set out at paragraph 53 above.

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150. We do not accept that the Tribunal made what might be termed "the *Anya* error" in this case, as Ms Monaghan argues. In particular, rather than simply set out the evidence against the Respondent, or even Mr Chitra in particular, and then say that it found Mr Chitra to be a truthful witness, and therefore rejected the allegation of discrimination, the Tribunal engaged in a careful analysis of the evidence as we have explained. It looked carefully at each of the documents on which the Claimant relied and made findings as to what each meant/showed.

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It also based its conclusions on its assessment of all of the evidence. It did not simply take Mr Chitra at face value but noted, for example, that aspects of his evidence were *"corroborated by the other witnesses"* (paragraph 212) and tested what he had to say by reference to the documentary evidence in the case.

151. We agree that ideally the Tribunal would have explicitly referred to the risk of subconscious discrimination but we are confident that the Tribunal were aware of this aspect of the law, having been referred to the relevant authorities and given that the point is elementary. Significantly, this was a case in which the case presented to the Tribunal was that the Respondent had acted on a belief that *"broken marriage equals broken ministry".* On the evidence, only one of the five Trustees was found to hold this view. Mr Chitra gave evidence as to whether he acted on that view and the Tribunal accepted that evidence. There is a difference between a decision maker who is unaware of their prejudices and/or does not appreciate the influence which those prejudices have on them, and a decision maker who is well aware of their prejudices and consciously seeks to ensure that they do not act on them. In the latter case it is not impossible that they are being truthful but are nevertheless mistaken in that they have failed to appreciate that they were influenced by the prohibited consideration. But it is significantly less likely. Moreover, even if Mr Chitra was subconsciously influenced by his views about marriage and the ministry there was no evidence or finding that, for example, he was the dominant Trustee or that he manipulated, cajoled or persuaded others to dismiss. On the Tribunal's findings, they reached their own decisions, reluctantly and after careful deliberation.

Unfair Dismissal

The challenge to the Tribunal's rejection of the unfair dismissal claim

152. In the light of our rejection of the Claimant's arguments on the question of discrimination, his challenge to the finding that he was fairly dismissed fails given that it was based solely on the proposition that his dismissal was necessarily unfair if part of the reason for the dismissal was unlawful discrimination. We express no final view on whether the proposition is sound in any event given that it is academic and was not fully argued before us by either party.

153. We see the logic of the argument that the statutory regimes applicable to unfair dismissal and discrimination are separate, and engage different legal considerations: compare *Amnesty International v Ahmed* (supra) which distinguished breach of the equality legislation from

breach of contract for the purposes of a constructive dismissal claim. Arguably, if the principal reason for dismissal (which is what section 98 of the 1996 Act requires the Tribunal to identify where there is more than one reason for dismissal) is lawful, the fact that another of the reasons for dismissal was unlawful does not, of itself, mean that the dismissal is unfair. Moreover, in such a case the claimant will have a remedy under the Equality Act 2010. But the point is unattractive.

The challenge to the Tribunal's alternative findings on remedy

154. Again, we express no final view on the Tribunal's findings that for various reasons no award of compensation would have been made even if liability for unfair dismissal and/or unlawful marriage discrimination had been found. These questions are academic in the light of our conclusion that the Tribunal's dismissal of both complaints should stand and, again, they were not fully argued before us. However:

a. We think it unlikely that a finding that a reduction of 100% on grounds of contributory fault can be right given that this would imply that the Claimant was solely responsible for his dismissal (see e.g. *Gibson v British Transport Docks Board* [1982] IRLR 228 EAT) whereas, on the hypothesis that he had been dismissed because of marriage, this could not logically be the position.

b. We see the superficial attraction of the view that the Claimant would have been dismissed in any event given his conduct, and given that only one of the five Trustees was positively found to have the views about marriage which the Claimant alleged. But much would depend on what the basis for the hypothetical decision that there had been discrimination was: the Tribunal did not this set out clearly and it need not have been solely on the basis that these views were consciously held by all of the Trustees. We are also doubtful that a simple application of *Polkey* principles by analogy is appropriate in relation to the question of compensation for discrimination, where the approach is based on the general law of tort.

155. Had we set aside the Tribunal's decision on marriage discrimination, then, it is quite possible that we would have remitted the question of remedy. But that would have depended on the basis on which we had allowed the appeal.

Conclusion

156. For all of these reasons we dismiss the appeal.